

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

April 12, 2012

In the Matter of MESSERSCHMIDT/WAKELEY,
Minors.

No. 306147
Crawford Circuit Court
Family Division
LC No. 08-003628-NA

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights to his minor children under MCL 712A.19b(3)(c)(ii), (g), and (j). We affirm.

Respondent argues that the trial court clearly erred in terminating his parental rights without clear and convincing evidence. Specifically, respondent alleged that there was insufficient evidence that his alcohol use adversely affected his parenting and constituted a new condition bringing the children under the court's jurisdiction. A finding of statutory grounds is only reversed if the trial court clearly erred. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000).

We cannot conclude that the trial court clearly erred in the termination decision. Irrespective of the quality of the evidence presented to address respondent's alcohol problems, there was evidence that overconsumption of alcohol had resulted in serious problems for respondent, including an impaired driving offense and time served in jail. Respondent admitted that he drank heavily in social situations and alcohol contributed to the chaos in his home. The trial court was especially concerned by respondent's testimony that it was possible to continue drinking in moderation and his apparent lack of honesty about his drinking. Expert testimony indicated that respondent was in the early stages of alcoholism. The court was in the best position to judge the credibility of the witness testimony. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, respondent did not demonstrate a serious commitment to rectifying his issues and gaining custody of his daughters when he failed to comply with the court order to frequently attend Alcoholics Anonymous (AA) and attempted to mislead the court regarding his attendance.

Respondent also argues that petitioner failed to provide services reasonably tailored to rectify his alcohol issues. Under the express language of MCL 712A.19b(3)(c)(ii), the respondent must be given a reasonable opportunity to rectify the new circumstance. Further, petitioner generally must make reasonable efforts to rectify the problems through a service plan.

In re Fried, 266 Mich App 535, 542; 702 NW2d 192 (2005). To succeed on appeal on a claim that petitioner did not make reasonable efforts, a respondent must establish that he would have fared better if petitioner offered other services. *Id.* at 543. Respondent does not cite any additional services he should have received. Contrary to the impression he creates on appeal, he received substantial substance abuse counseling. Petitioner provided reasonable services.

Respondent further contends that the trial court erred in comparing the advantages of the children's foster home. The court mentioned the foster home while analyzing the children's best interests, after finding statutory grounds. Although it is not appropriate to compare a respondent's home with an alternative home when establishing statutory grounds for termination, it is appropriate when determining the children's best interests. *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009). The court did not err.

Finally, respondent argues that he was denied his right to effective assistance of counsel. This right is violated only when the attorney's performance fell below an objective level of reasonableness, and the respondent was so prejudiced that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The respondent must establish a reasonable probability that the outcome of the proceeding would have been different had the attorney not erred. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Respondent asserts that his attorney should have requested an updated psychological evaluation sooner. However, even if the court had granted an earlier request, it would still likely not have changed the outcome because the court's opinion was based primarily on respondent's actions and testimony, not the 2008 evaluation. See *Johnson*, 451 Mich at 124. Respondent also contends that his attorney should have pursued additional services, including alternatives to AA. However, respondent was given the opportunity to find an alternative activity and did not do so. Respondent's testimony questioning the benefits from AA, and his dishonesty about how often he attended made it less likely that any assistance from petitioner or his attorney in finding an alternative would have succeeded. See *Johnson*, 451 Mich at 124.

Respondent also argues that his attorney should have provided a better defense, including cross-examining witnesses about the evidence of his alcohol abuse. However, this could have helped or hurt respondent. Allowing petitioner to present only vague evidence of his substance abuse might have been sound strategy. The attorney's efforts did not fall below an objective level of reasonableness. *Toma*, 462 Mich at 302.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly